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In the

Supreme Court of the United States

STANDARD BRANDS, INC., *Petitioner,*

vs.

J. F. BATEMAN, J. W. GALBRATH, E. J. DAVIS, JAMES H. MOORE AND C. H. BENBON, Statutory Trustees for Batemore, Inc., a Dissolved Corporation, *Respondents.*

No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Federal Circuit entered on November 13, 1950.

Opinion Below.

The judgment of the Federal District Court was entered without opinion. The opinion of the Court of Appeals was written by Judge Thomas on November 13, 1950, and is set out in the record (R. 336-353).

Federal Jurisdiction.

Federal jurisdiction is based upon the fact that there is complete diversity of citizenship and the amount involved exceeded the statutory requirement for Federal jurisdiction.

Jurisdiction of the Supreme Court.

The judgment of the Court of Appeals was entered on November 13, 1950, against the petitioner. Petition for rehearing was denied on December 5, 1950 (R. 379). Jurisdiction of this court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code, effective September 1, 1948.

Summary and Statement of the Matter Involved.

Standard Brands, Inc., your petitioner, owned and occupied a building in Kansas City, Missouri. This building was sold on December 12, 1945, to Batemore, Inc., and at the same time the new owner executed a lease for three years to Standard Brands, Inc., as tenant (R. 36).

On June 26, 1946, the building was damaged by fire. Batemore, Inc., carried fire insurance in two companies and the two fire insurance companies settled their liabilities under the policies for $39,875 (R. 304, 158, 159). The two fire insurance companies then brought suit in the name of Batemore, Inc., against Standard Brands for $39,875. The lease was set out in full as Exhibit A to the complaint (R. 2).

Batemore, Inc., then was dissolved, so the two fire insurance companies filed an amended complaint in the name of the statutory trustees of that dissolved corpora-

tion. The lease was again incorporated in toto in this amended complaint by reference (R. 2).

The lease provided that fire loss was to be repaired by the landlord (R. 40), and fire insurance was carried by the landlord. Standard Brands in its answer, therefore, alleged that the amended complaint, which included the lease, failed to "state facts sufficient to entitle the plaintiffs to any relief or judgment against this defendant" (R. 6).

Standard Brands also filed a third party complaint in the action against Midwest Refrigeration, Inc., as third party defendant, setting out that the fire loss was caused by the negligence of an employee of the third party defendant in repairing the air-conditioning equipment (R. 8). The plaintiffs did not include Midwest as an additional defendant.

The case was tried to a jury. The lease was introduced in evidence by the plaintiffs (P's. Exhibit 19, R. 37). Standard Brands in the testimony of its witnesses showed that the fire was caused by the negligence of an employee of Midwest in repairing a pressure switch on the air-conditioning unit. The cause of the fire is not in dispute. At the conclusion of the testimony, both Standard Brands and Midwest moved for directed verdicts. The motion for a directed verdict of Standard Brands included as one basis for its allowance that the terms of the lease precluded a recovery against it (R. 306). The court sustained the motion of Midwest and overruled the motion of Standard Brands (R. 320, 327).

The court then instructed the jury that Standard Brands was liable to the plaintiffs for the negligence of the employee of Midwest (R. 318). This negligence had been established by Standard Brands and the testi-

mony of its witnesses. The jury returned a verdict for $39,875 and costs against Standard Brands (R. 323).

Standard Brands then moved for judgment notwithstanding the verdict or in the alternative for a new trial. The motion was based upon the reasons for a directed verdict included in its motion for a directed verdict (R. 325). The trial court overruled the motion. The trial court also overruled the motion of Standard Brands for a new trial against Midwest.

The case was then appealed to the Circuit Court of Appeals for the Eighth District. Standard Brands filed its points on which it intended to rely on appeal and included therein the point that the trial court had erred in failing to sustain defendant's motion for directed verdict (R. 332).

The Circuit Court of Appeals affirmed the judgment against Standard Brands on the ground that paragraphs 2 and 3 of the lease required the tenant to repair and that the tenant was liable for fire loss caused by the negligence of an independent contractor while making those repairs. The court ordered a new trial of the third party case of Standard Brands against Midwest (R. 353, 4).

Paragraph 7 of the lease set out in plaintiff's complaint and evidence provided that the landlord should repair fire damage.[1] The opinion of the Circuit Court of Appeals held that paragraph 7 of the lease could not be

[1] "7. In case of fire, the tenant shall give immediate notice thereof to the landlord who shall thereupon cause the damage to be repaired with reasonable speed * * *."

considered, since it had not been properly raised in the answer or asserted in the trial court.[2]

Standard Brands is herein petitioning for certiorari to review the judgment of the Court of Appeals in favor of the plaintiffs and against Standard Brands. We are advised that Midwest also is filing a petition for certiorari to review the judgment of the Court of Appeals in ordering a new trial in the third party action of Standard Brands against Midwest.

Questions Presented.

A.

Did the Court of Appeals follow the principles established by the Supreme Court of the United States in holding that provisions of a lease defeating recovery must be affirmatively pleaded in the answer, even though the lease is set out in full by reference in the amended complaint, introduced in evidence by the plaintiffs, and liability predicated on other provisions of that same lease?

B.

Does the judgment of the Court of Appeals for the Eighth Circuit conflict with the case of *Anderson &*

[2](R. 345) "In its reply brief defendant contends that it is not absolutely liable for failure to maintain the interior of the rented building because under paragraph 7 of the lease between the parties plaintiff landlord is required to repair fire damage. This contention was not pleaded in the answer or otherwise asserted in the trial court. No ruling thereon by the trial court is shown nor properly raised in this court. The question cannot, therefore, properly be said to be before us. *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 496; *Hall* v. *Aetna Life Ins. Co.*, 8 Cir., 85 F. 2d 447, 452; *Columbia Pictures Corporation* v. *Lawton-Byrne-Bruner Ins. Co.*, 8 Cir., 73 F. 2d 18, 20; *American Surety Co.* v. *Republic Casualty Co.*, 8 Cir., 42 F. 2d 807, 810; *Taylor* v. *Taylor*, 232 S. W. 2d 382, ... Mo. ...."

Brown Co. v. *Anderson,* 161 F. 2d 974 (C. C. A. 7th, 1947) in construing Rule 8 of the Federal Rules of Civil Procedure?

C.

Is the opinion in direct conflict with the case of *General Mills, Inc.,* v. *Goldman,* 184 F. 2d 359 (C. C. A. 8th, 1950) and with Missouri decisions?

Reasons for Granting the Writ.

1. The Court of Appeals did not follow the principles established by the Supreme Court of the United States in holding that provisions of a lease defeating recovery must be affirmatively pleaded in the answer, even though the lease is set out in full by reference in the amended complaint, introduced in evidence by the plaintiffs, and liability predicated upon other provisions of that same lease.

The plaintiffs filed an original complaint which set out the lease in full as Exhibit A. The plaintiffs' amended complaint set out certain provisions of that same lease and incorporated Exhibit A of the original complaint by reference (R. 2). The defendant answered that the amended complaint failed to state facts sufficient to entitle plaintiffs to relief, but did not specify by number the paragraphs of the lease defeating recovery. The plaintiffs then introduced the lease into evidence at the trial (R. 37).

The opinion of the Eighth Circuit Court of Appeals held that the plaintiffs were liable to the landlord's fire insurance companies by reason of paragraphs 2 and 3 of that lease (R. 341). These paragraphs required the tenant to repair. The opinion of the Eighth Circuit then held that other provisions of the lease could not be considered to defeat recovery because "not pleaded in the answer or otherwise asserted in the trial court" (R. 345).

Rule 8 (c) of the Federal Rules of Civil Procedure enumerates the matters that must be affirmatively pleaded.[1] The defense to plaintiff's amended complaint was that it did not state a cause of action. This defense was raised by the defendant.

The Supreme Court has never interpreted Rule 8. The opinion of the Eighth Circuit holds that a defense not classified as an affirmative defense by the Rules or an opinion in any case must nevertheless be affirmatively pleaded. Such an interpretation of the Rules is clearly contrary to the principles established by the Supreme Court.

Those principles of pleading were set forth in the case of *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 58 S. Ct. 745, 82 L. Ed. 507. The court stated as follows (l. c. 200):

> "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."

The principles thus established by the Supreme Court are carried out in Rule 1, which provides that the rules "shall be construed to serve the just, speedy and inexpensive determination of every action."

The risk of loss by fire on the building under the lease was to be carried by fire insurance companies and not

[1] "8 (c) In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense * * *."

by the tenant. Both parties knew this. The lease specifically provided in paragraph 7 as follows:

> "In case of fire, the tenant shall give immediate notice to the landlord who shall thereupon cause the damage to be repaired with reasonable speed * * *"

Paragraph 6 of the lease provided as follows:

> "That the tenant will not itself nor will it * * * permit anything to be brought into said premises, or to be kept therein, which will in anywise increase the rate of fire insurance of said demised premises * * *"

The fire insurance companies were required by their policies to pay the $39,875 whether the fire loss was caused by negligence or not. Standard fire insurance policies require payment of fire loss caused by negligence because most fires are started by negligence.

The Court of Appeals held, however, that these paragraphs of the lease defeating liability were not available to the defendant because not affirmatively pleaded. This holding is contrary to the principles established by the Supreme Court of the United States.

The purpose of Rule 8(c) requiring certain matters to be affirmatively pleaded is to prevent surprise and thus find the plaintiff unprepared to meet with evidence the affirmative matter. The plaintiffs in the present case could not by evidence have avoided the language of the lease. Their remedy was against Midwest which they failed to assert.

Where evidence is introduced by the plaintiff which shows that the plaintiff is not entitled to recover, then failure to plead a matter as an affirmative defense is immaterial.

In the case of *Oscanyan* v. *W. R. Arms Co.,* 26 L. Ed. 539, 103 U. S. 261, the Supreme Court held that illegality, although an affirmative defense, might be relied upon by the defendant to defeat plaintiff's cause of action where it appeared from the opening statement of counsel for plaintiff.

In the recent case of *Carr* v. *National Discount Corporation,* 172 F. 2d 899 (C. C. A. 6th 1949), the plaintiff sued for false arrest. The defendant did not affirmatively plead that it had probable cause for the arrest. The judgment for the defendant based upon probable cause was affirmed. The court held that the defense of probable cause was an affirmative defense but not applicable where plaintiff's own evidence showed the probable cause for the arrest.

The interpretation of Rule 8 is of vital importance to all litigants. The interpretation of that Rule is of fundamental importance in the interpretation of all of the Rules. Is the opinion of the Eigthth Circuit Court of Appeals to stand which holds that litigants are denied their proper defenses because their counsel have failed to plead affirmatively matters which are not required to be affirmatively pleaded under Rule 8(c) or in any decided opinion of any court?

2. The judgment of the Court of Appeals for the Eighth Circuit conflicts with the case of *Anderson & Brown Co.* v. *Anderson,* 161 F. 2d 974 (C. C. A. 7th 1947), in construing Rule 8 of the Federal Rules of Civil Procedure.

Rule 8 of the Federal Rules of Civil Procedure in subparagraph (c) enumerates those matters which must be affirmatively pleaded. The opinion here of the Eighth Circuit holds that provisions of a lease set out by reference in the amended complaint which defeat recovery must be affirmatively pleaded in the answer.

The opinion in the case of *Anderson & Brown Co.* v. *Anderson,* 161 F. 2d 974 (C. C. A. 7th 1947) holds exactly to the contrary. In that case one Brandenburg had the exclusive agency to sell certain magnetic chucks manufactured by the defendant. Brandenburg's contract provided that he was to receive 40% of the sales price of each chuck, but that the price of each chuck was to be later agreed upon between the parties. Brandenburg assigned the contract to the plaintiff company. The plaintiff company filed suit against the defendant for breach of the contract, damages and an injunction. The defendant answered denying performance of the contract and filed two counterclaims. At the trial the court found that the contract was unenforceable because it was vague and indefinite and entered judgment against the plaintiff. The plaintiff appealed and his position was stated by the court as follows (l. c. 976):

> "Appellant asserts that the crux of this appeal is whether or not an uncertainty, rendering a contract unenforceable, is an affirmative defense which must be pleaded * * *"

The court ruled as follows (l. c. 977):

> "* * * It seems clear that it appears from the face of the contract sued upon that at least one element essential to its validity and enforceability was lacking, and that the contract, therefore, furnished the basis for no claim upon which the relief sought could be granted * * *"

If the decision of the Seventh Circuit in the *Anderson* case is correct, then the case of your petitioner was wrongly decided by the Eighth Circuit. There is an irreconciliable conflict between the holding of the two cases.

3. The opinion is in direct conflict with the case of *General Mills, Inc.*, v. *Goldman*, 184 F. 2d 359 (C. C. A. 8th 1950) and Missouri decisions.

In the *General Mills* case the landlord's fire insurance companies sued the tenant for fire loss caused by the negligence of one of the tenant's employees. The court held that the lease relieved the tenant of liability for fire loss. The General Mills lease, set out in the complaint, provided that the tenant would "not use or permit anything upon said premises that will increase the rate of insurance thereon." The General Mills lease also provided that the tenant would return the premises at the end of the term in as good condition "loss by fire and ordinary wear excepted."

The Standard Brands lease provides that the landlord shall repair fire loss. The insurance provision is for all practical purposes identical with that provision in the General Mills lease. Yet based upon a claimed defective pleading, the decisions are absolutely opposite. The Standard Brands opinion makes no mention of the General Mills case decided less than two months previously.

The opinion of the Standard Brands case also holds that the defense of other provisions of the lease had not otherwise been raised in the trial court. At the close of all of the case the defendant moved for a directed verdict (R. 306). This motion called to the court's attention that the terms of the lease precluded recovery. Again after the verdict the defendant filed its motion for judgment, n.o.v. (R. 325). As part of the record the defendant designated its points on appeal in part that the court had erred in failing to sustain the motion for a directed verdict because the fire was caused by incidents insured against by the real parties in interest, the in-

surance companies seeking to recover herein through the plaintiffs (R. 332).

The Standard Brands opinion rules with the dissent of the General Mills case and bases its opinion on an improper interpretation of the Federal Rules and the record.

The opinion is also in conflict with Missouri law. The opinion holds that a tenant obliged to repair under a lease who hires an independent contractor to make the repairs is liable for the fire damage caused by the negligence of the independent contractor while making those repairs. The opinion relies on the case of *Bloecher* v. *Duerbeck,* 333 Mo. 359, 62 S. W. 2d 553 (1933). This case was finally disposed of in 338 Mo. 535, 92 S. W. 2d 681 (1935).

In the *Bloecher* case the defendant owned a building. He employed an independent contractor to install a hot water heater. After the installation was accepted by the landlord, the heater exploded injuring the plaintiff who was a guest of the defendant. Liability was based upon a violation of the landlord's duty to refrain from leaving the premises in a dangerous condition and not upon the negligence of the independent contractor. The court quoting from its earlier opinion stated as follows (l. c. 686):

> "* * * The injury was not to one of the employees of the contractor, or caused to a third person by the negligence of such employee during the course of the work, as to whom and the contractor the relation of master and servant existed. It might be that in such a case the independent contractor alone would be responsible. This accident was the result of a permanent defect in the installation of the heating plant, which would be corrected, if at all, by the owner of the premises. The accident was the

> result of the defective and dangerous condition in which the premises were left after the work of installation of the heating system was completed and it became part of the demised premises and was accepted by the landlord. For this defective and dangerous condition which inhered in the completed work, we think the landlord should be held liable notwithstanding he caused the work to be done by an independent contractor."

The *Bloecher* case is not in point. The liability was there imposed for the violation of the landlord's duty to refrain from leaving the premises in a dangerous condition. Liability was not imposed because of the negligence of an independent contractor.

The Missouri law, universally applied, is stated in the *Restatement of the Law of Torts,* Section 426, as follows:

> "Negligence in the Operative Detail of Doing the Work.
>
> "Except as stated in Sections 427 to 429, an employer of an independent contractor is not liable for bodily harm caused by any negligence of the contractor which does not effect the result which the employer is under a duty to have attained but consists solely in the improper manner in which the contractor does the detail of the work necessary to attain such result."

The illustration used in the Restatement clearly makes the distinction apparent.

> "1. A employs B, a competent contractor, to excavate a cellar on land immediately adjoining a public highway. The contract requires B to provide the fence necessary to prevent pedestrians from falling into the excavation. A is liable to C, a pe-

> destrian, who falls into the excavation because the fence as erected by B is flimsy or because B has not erected the fence as his contract required. A is not liable to D, a pedestrian hurt by the carelessness of B's workmen in handling the timbers while they are erecting the fence or by the careless handling of the tools while so doing."

The case of *Bailey* v. *Zlotnick,* 149 F. 2d 505 (C. C. A. Dist. of Col. 1945) illustrates the doctrine. The court there held the landlord liable to the tenant in damages for injuries caused when a ceiling fell on the tenant. The ceiling fell because an independent contractor in installing a heater let water get on the ceiling. The landlord was held liable not because of the negligence of the independent contractor but because the contractor made the premises unsafe. The landlord was under a duty not to create an unsafe condition. An unsafe condition had been created and therefore the landlord was liable.

The principle involved is set forth in an analysis in 90 A. L. R. 50, where the author quotes from an Ohio case as follows (l. c. 51):

> "* * * The duty was to keep the premises in a reasonably safe condition for the tenant. He is held liable not because of the relation of landlord and tenant alone and because the independent contractor was negligent in doing the work, but because he had become responsible for the unsafe condition in the premises * * *"

Conclusion.

Certiorari should be granted to review the judgment of the Court of Appeals. That judgment construes Rule 8 (c) of the Federal Rules of Civil Procedure by adding a requirement that other defenses must be affirmatively pleaded. The judgment is in conflict with the principles established by the Supreme Court, is in conflict with the *Anderson* case, and is in conflict with the *General Mills* case and Missouri decisions.

Respectfully submitted,

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No. 490.

In the

Supreme Court of the United States

STANDARD BRANDS, INC., a corporation, *Petitioner*,

vs.

J. F. BATEMAN, J. W. GALBREATH, E. J. DAVIS, JAMES H. MOORE and C. G. BENSON, Statutory Trustees of BATEMAN, INC., a Dissolved Corporation, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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3. The opinion is not in conflict with the case of General Mills, Inc. v. Goldman, 184 F. 2d 359 (C. C. A. 8th, 1950), and even if it were, such conflict would not be a reason for granting certiorari, because the respective decisions were founded on the substantive law of different states and the decisions were both made by the Court of Appeals for the Eighth Circuit and therefore do not involve a conflict between circuits. The opinion also is not in conflict with Missouri decisions 14

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Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Col. 8, Sec. 6301, p. 538.....14, 15
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In the

Supreme Court of the United States

STANDARD BRANDS, INC., a corporation, *Petitioner*,

vs.

J. F. BATEMAN, J. W. GALBREATH, E. J. DAVIS, JAMES H. MOORE and C. G. BENSON, Statutory Trustees of BATEMAN, INC., a Dissolved Corporation, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 490.

I.

STATEMENT OF THE CASE.[1]

A corporation, now dissolved, and of which plaintiffs are the statutory trustees (pleaded R. 1 and admitted R. 6), owned a building on June 26, 1946, which was then occupied by defendant as its tenant (R. 35, Plaintiffs'

[1]Since, in the petition (including the brief in suport), there are statements unsupported by any record citations, or by those given, or by any part of the record, and material facts are omitted therein which are necessary to a proper consideration of petitioner's reasons for granting the writ and respondents' reasons for its denial, we will assist the Court by submitting a brief statement of all material facts necessary for a consideration of the points raised in the petition, supported by record citations. For clarity, since the record refers to the trial, we will refer to petitioner, Standard Brands, Inc., as defendant and to respondents, J. F. Bateman, *et al.*, as plaintiffs.

Ex. 19, R. 37-42, offered R. 37). On said date the building was damaged by fire (R. 80).

Suit was thereafter instituted by plaintiffs' predecessor corporation against the defendant, and the parties proceeded to trial upon the issues raised by plaintiffs' second amended petition (R. 1-5) and the answer thereto (R. 6-7). This petition was in two counts each praying for recovery against the defendant of damages in the amount of $39,875 for injury to the building by the fire (R. 1-5).

Count I was an action for breach of contract, based upon paragraphs 2, 3, 5 and 6 of the lease, and parts of each of the said paragraphs were specifically set out in said count (R. 2). Count I also *mentioned,* in a statement inclosed in parentheses, that the *entire* lease had previously been filed as an exhibit to the *original* petition, *an abandoned pleading* (R. 2).

Count II was an action in tort for the alleged negligence of defendant causing plaintiffs' building to be damaged (R. 4-5). It incorporated all pertinent allegations of Count I (R. 4).

Count I was dismissed before the case was submitted to the jury (R. 324) and the case was submitted to the jury only on Count II of the petition[2] (R. 324).

During the course of the trial, plaintiffs introduced the lease in evidence, showing that under paragraph two thereof, the defendant was required to make certain repairs (Plaintiffs' Ex. 19, R. 37-42, offered R. 37).

The plaintiffs proved that the fire was caused by the negligence of either Blosser (an employee of Midwest Refrigeration, Inc. (R. 43), whom the defendant had hired (R. 43, 298) to perform the repair work referred to above) or Schrader (an employee of defendant), or

[2]Therefore, only the petition and answer as to Count II should be considered in ruling on petitioner's contention as to the pleadings.

the negligence of both, and the court instructed the jury that the defendant was liable for the negligence, if any, of either[3] (R. 318). The damage was proved to be as much as sued for (R. 183). The jury, by its verdict for plaintiffs (R. 322), found that either Blosser or Schrader, or both, were negligent.

At the close of plaintiffs' evidence, and at the close of all the evidence, defendant moved for a directed verdict (R. 201 and 306), and after the jury returned a verdict for the plaintiffs, it moved for judgment in its favor in accordance with its motion for a directed verdict (R. 325). All of the motions alleged the same grounds which will hereinafter be discussed in greater detail.

[3]This instruction as to Blosser was proper because defendant could not delegate the duty it owed plaintiffs, so as to escape liability for the negligence of employees of independent contractors, because (1) the duty to repair was imposed by contract (Plaintiffs' Ex. 19, par. 2, R. 38, offered R. 37), and (2) the work to be done by said employee was inherently dangerous, and each of these reasons made the defendant liable to plaintiffs for the negligence of Blosser under Missouri law, as hereinafter briefed under point 3 of the argument Since the defendant admitted at the trial and [illegible] the Court of Appeals that Blosser was negligent, the Court of Appeals held that it was immaterial, as between plaintiffs and defendant, whether Schrader was also negligent, since the defendant was liable for Blosser's negligence, and it admitted that Blosser was negligent, the Court stating: "Neither is it material on the question here presented whether the explosion was due to the negligence of Schrader * * *" (R. 345).

II.

ARGUMENT.[1]

The petitioner has advanced three reasons in support of its contention that a writ of certiorari should issue from this Honorable Court to correct alleged error on the part of the Court of Appeals. These contentions will be argued by the respondents in the same order in which they have been presented by the petitioner.

1. The Court of Appeals correctly followed the principles established by the Supreme Court of the United States in ruling that a defense, not pleaded or otherwise raised at the trial, nor affirmatively disclosed on the face of the petition, is waived and cannot be urged as grounds for reversal.

The point which petitioner seeks to raise under its first point is that the principles of pleading established by the Supreme Court of the United States are violated by the opinion of the Court of Appeals wherein it held:

> "In its *reply brief* defendant contends that it is absolutely liable for failure to maintain the interior of the rented building because under paragraph 7 of the lease betweeen the parties plaintiff landlord is required to repair fire damage. This contention was *not pleaded* in the answer *or otherwise asserted* in the trial court. No ruling thereon by the trial court is shown nor properly raised in this court. The ques-

[1]The petitioner has failed to comply with Rule 38 (2) of this Honorable Court by commingling its petition and brief. This in itself is a sufficient reason for denying the writ. The rule permits annexation of the brief to the petition, not commingling thereof. This is important because we could save the Court's time by disregarding errors claimed in the brief, but not asserted as reasons for granting certiorari in the petition, if we could determine where the petition ends and the brief begins. *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U. S. 493, l. c. 496-497, 59 S. Ct. 316, l. c. 319-320, 83 L. Ed. 309, l. c. 312-313. Rule 38 (2) also so provides. Ordinarily the brief could at least be said to begin after the prayer for review by certiorari, but petitioner's prayer for certiorari begins on the first page of the petition. We will herein refer to pages of the combination petition and brief as (Br.....).

tion cannot, therefore, properly be said to be before us. *Dayton-Goose Creek Ry. Co.* v. *United States,* 63 U. S. 456, 496 (and other cases cited)" (italics ours) (R. 345).

The opinion shows that the petitioner thought so little of its contention as to paragraph 7 of the lease that it did not even raise this point until its *reply brief* in the Court of Appeals.

It now states that the quoted portion of the opinion is an incorrect statement of the law because it "did not follow the principles established" by this Honorable Court, although the Supreme Court case cited therein supports the opinion. The petitioner really is contending that the quoted portion of the opinion is an incorrect statement of the *facts* of the case. In other words, it contends that it *did plead* the purported defense and *did assert* it in the trial court.

Since petitioner's contention is actually that the opinion of the Court of Appeals is an incorrect statement of *fact,* rather than of *law,* this is sufficient ground for denying the petition for certiorari as to reason one. This Honorable Court has held that it will not issue a writ of certiorari where it turns on a *factual* dispute, and where, as here, the *facts* have been determined adversely to the petitioner's contention by the Court of Appeals. *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, l. c. 636, 66 S. Ct. 389, l. c. 392, 90 L. Ed. 367, l. c. 370.

In the event this Honorable Court desires to pursue the matter further, however, we will hereinafter show that the *facts* of the opinion are correct.

Let us consider first, the factual statement in the opinion that the defense was *not pleaded.*

Rule 8(c) of the Federal Rules of Civil Procedure designates an assumption of risk defense as a defense

which must be specifically pleaded in the answer. Petitioner's purported defense under Par. 7 is obviously in the nature of an assumption of risk defense. Even if it were not to be so considered, said Rule 8(c) requires *all* affirmative defenses to be specifically pleaded and a contract defense to respondents' tort action (on which the case was submitted to the jury, R. 324) is certainly an affirmative defense. Petitioner's answer (R. 6-7) discloses that it did not specifically plead said defense.

However, some authorities hold that Rule 8(c) is not the exclusive manner in which an affirmative defense may be raised. Such authorities state "* * * *if the defense affirmatively appeared on the face of the pleading* relied upon as stating grounds for relief, such pleading could be attacked *by demurrer or its more modern equivalent.*" Cyclopedia of Federal Procedure, 2d Ed., Vol. 4, Sec. 1303, p. 633.

Petitioner vaguely implies that paragraph 7, its purported defense "affirmatively appeared" on the face of the second amended petition. This is erroneous (R. 1-5).

In order so to find, petitioner would require the Court to retrace a most circuitous and devious path through a labyrinth of pleadings, consisting of a reference in an active count to *pertinent allegations* of an *abandoned count,* which is interdependent upon an exhibit to a still previously *abandoned petition* and which further requires a finding that the exhibit to the *abandoned pleading* was incorporated in or made a part of the *abandoned count.*

Let us attempt to trace defendant's arguments. Since Count I was dismissed (R. 324), only Count II may be considered in determining whether the defense was pleaded. 41 Am. Jur., Pleading, Sec. 135, p. 383. Paragraph 7 was *not* specifically pleaded in Count II (R. 4-5).

Petitioner's argument must be, therefore, that paragraph 7 was incorporated into Count II by respondents' pleading whereby it incorporated in Count II "* * * all the *pertinent allegations* of its first count * * *" (italics ours) (Par. I, R. 4).

This argument is fallacious because the only paragraphs of the lease deemed to be "pertinent" enough to be pleaded in Count I were paragraphs 2, 3, 5 and 6 (R. 2).

Petitioner's argument goes further, however, and states that the entire lease was incorporated into Count I. This is an erroneous argument, because (1) plaintiffs *could not do so*, and (2) plaintiffs *did not do so*.

Plaintiffs *could not do so* because the lease was not an exhibit to the second amended petition, but was an exhibit to an abandoned pleading, and a party cannot incorporate into an active pleading an exhibit to an abandoned pleading. *Oppenheimer, et al.*, v. *J. E. Young & Co., Inc., et al.*, 3 F. R. D. 220, l. c. 226, Point 15.

Plaintiffs *did not do so*, because the only reference to the entire lease in Count I is as follows (R. 2): "(That a copy of said lease is marked Exhibit 'A,' attached to the original petition filed herein.)" This mere reference in the second amended petition to an extraneous record did not incorporate same therein. In order to accomplish such a purpose (if it *could* be done), plaintiffs would have to employ such language as "incorporated herein," or "made a part hereof." Cyclopedia of Federal Procedure, 2d Ed., Vol. 4, Sec. 1444, p. 713. If plaintiffs had attempted to rely, at the trial, upon paragraphs other than those specifically pleaded (*i.e.*, 2, 3, 5 and 6), an objection would have been properly sustained that such other paragraphs were not pleaded.

Petitioner's argument as to the pleadings should not be sustained as the purpose of pleadings is to present the issues and not to conceal them.

Assuming, *arguendo,* that the defense was affirmatively pleaded in Count II of the second amended petition, the petitioner still did not avail itself of the proper means of raising such defense because it did not file the "modern equivalent of a demurrer," *i.e.,* a motion to dismiss the second amended petition, as required by the rule quoted from Cyclopedia of Federal Procedure, 2nd Ed., Vol. 4, Sec. 1303, p. 633.

Having shown that the facts stated in the Court of Appeals' opinion are correct, in that petitioner did not *plead* paragraph 7 as a defense, let us consider whether the opinion is also correct in stating that no defense based upon said paragraph was "*otherwise asserted in the trial court.*"

A careful search of the record fails to reveal any comment made concerning par. 7 during the trial. The defendant did not, in any of its objections, contend that under par. 7 plaintiffs were required to repair fire damage.

Furthermore, the trial court did not instruct the jury as to par. 7. At the conclusion of the court's charge, it asked the defendant if it desired to request any additional instructions, and the defendant declined to so request (R. 319).

The only claim petitioner even asserts to show it raised the defense in the trial court is that its motion for a directed verdict "* * * included as one basis for its allowance that the terms of the lease precluded a recovery against it" (Br. 3). An examination of the motion petitioner cites (R. 306) shows the only ground of said motion which refers to the lease is subdivision (a) thereof, which states:

> "Under the facts and the law plaintiffs are not entitled to recover under Count I or Count II in that by the terms of the lease introduced in evidence and

> under Missouri law the defendant Standard Brands, Inc., *is liable only for its negligence, which the plaintiffs have wholly failed to prove.*"[5]

Thus petitioner clearly did not in said motion contend that par. 7 was a ground for a directed verdict. The only contention it raised as to Count II was plaintiffs' failure to meet their burden of proof, because petitioner admits therein that if plaintiffs met their burden of proof as to its negligence, then it was liable therefor; whereas its argument as to par. 7 is that it is not liable, assuming it was negligent, because the landlord was required to repair fire damage. The inconsistence of the arguments shows that petitioner did not intend to raise par. 7 as a defense.

Furthermore, Rule 50 (a) of the Federal Rules of Civil Procedure provides:

> "A motion for a directed verdict shall state the *specific grounds therefor.*" (Italics ours.)

Yet petitioner raised no *specific ground* about the lease, but referred to it generally, except as qualified by the italicized portion of its motion. The defense, if it was one, was not "*otherwise asserted at the trial.*"

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[5]It is necessary to review the pleadings and Missouri law to show the Court the defense petitioner really attempted to raise in this portion of its motion. In Count I, respondents claimed that petitioner was liable for breach of contract, irrespective of negligence, because at the termination of the lease, petitioner failed to "* * * quit and surrender the demised premises in as good state and condition as received. * * *" (Par. 3, R. 2, Par. b, R. 3) as required by the lease. (Par. 3, Plffs.' Ex. 19, R. 39, offered R. 37). Under Missouri law, Mo. R. S. 1939, Sec. 3014, petitioner's contention was correct because that statute held that a tenant could be held liable, under such a lease provision, only for its negligence or the negligence of those for whom it was legally liable. Petitioner raised that contention as to Count I (later dismissed, R. 324), and as to Count II for negligence (on which judgment was had), it merely contended that plaintiffs had failed in their burden of proof as to negligence. It certainly did not, in the motion, raise a contention as to par. 7, because its statement as to the lease was qualified by the portion of the motion which we have italicized.

Had the petitioner believed it had a defense based upon par. 7, it would have been elementary for it to have requested the court to instruct the jury that under par. 7 of the lease the plaintiffs were required to repair fire damage, as it now contends, or for it to have requested a directed verdict *on that ground.*

The pleading and trial of a case is not a game in which parties litigant plead broadly and vaguely, concealing defenses and issues, omitting objections based on such hidden defenses, and raising broad, vague grounds for a motion of dismissal, in the hope that the jury will return a verdict in their favor, and trusting that if the jury returns a verdict against them, they will be able to get it set aside by raising their concealed defenses. We challenge the petitioner to show this Honorable Court one single place in the record where it invited the trial court's attention to par. 7 of the lease, or presented the theory to the trial court, which it now raises, that the plaintiffs were obligated to repair fire damage and therefore the defendant was absolved from liability.

The rule in this regard is well stated in Simkins Federal Practice, 3rd Edition, Sec. 1002, p. 720, as follows:

> "Where a case is tried on one theory, another theory may not be substituted in the appellate court. The theory on which the case was tried must be determined from the method in which the trial was conducted, evidence offered, objections made, and rulings of court invoked, and not by argument offered at the conclusion of the trial."

For like authority see *Helvering* v. *Wood,* 309 U. S. 344, l. c. 349, 60 S. Ct. 551, l. c. 553-554, 84 L. Ed. 796, l. c. 799; and *Bovay* v. *Fuller,* 63 F. 2d 280, l. c. 284, pt. 9 (C. C. A. 8th, 1933).

Furthermore, even if this Honorable Court should hold

that par. 7 was pleaded as a defense and was raised at the trial, it cannot affect the merits of the case and no injury resulted from the failure of the trial court or the Court of Appeals to consider it, because it is obvious that said paragraph[6] merely granted plaintiffs an option, in case of fire, either to repair the fire damage or to terminate the lease. Plaintiffs exercised their option and terminated the lease term by canceling it by mutual agreement (Ptffs.' Ex. 19, R. 41, offered R. 37). Thus, the plaintiffs, by terminating the lease term, relieved themselves of any liability to repair and the alternate question of whether plaintiffs could have recovered the cost of repairs from the defendant for a fire caused by its negligence, in the event they had exercised their option to repair, becomes moot.

As to such nonprejudicial error (if it could be construed to be error), Title 28, U. S. C. A., Sec. 2111, provides:

> "On the hearing of an appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This Honorable Court held to the same effect in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, l. c. 259, 42 S. Ct. 475, l. c. 477, 66 L. Ed. 927, l. c. 930, in the following language:

> "But mere error, without more, is not enough to upset the judgment, if the record discloses that no injury could have resulted therefrom."

[6] "7—In case of fire, the tenant shall give immediate notice thereof to the landlord who shall thereupon cause the damage to be repaired with reasonable speed, *but if the premises are so damaged that the landlord shall decide not to rebuild, the term of this lease shall cease at the option of the landlord and accrued rent shall be paid by the tenant up to the time of any such destruction by fire.* The tenant agrees to permit the landlord or its agents to show the premises to persons wishing to hire or purchase same during ordinary business hours." (Plaintiffs' Ex. 19, R. 40, offered R. 37.) (Italics ours.)

Petitioner states that risk of fire was to be borne by fire insurance companies and both parties knew this. This is absolutely not true and there is not a scintilla of evidence in the record to support it. Plaintiffs' predecessor corporation contemplated that it *might* carry fire insurance for which it would pay the premiums, and therefore placed a prohibition in the contract against defendant causing its fire rates to be increased (Ptffs.' Ex. 19, Par. 6, R. 39-40, offered R. 37). This provision was for the benefit of plaintiffs, not defendant, and plaintiffs were *not required* to carry fire insurance by the terms of the lease. In the absence of such a specific requirement, and a specific agreement that defendant was to receive the benefit of said insurance, defendant is not relieved of liability for its negligence.

In *Landau* v. *Fred Schmitt Construction Co.*, 237 Mo. App. 908, l. c. 918, 179 S. W. 2d 138, l. c. 142 (1944), the court aptly held:

> "To permit a defendant wrongdoer to profit or reap any advantage from plaintiff's insurance would be to allow a wrongdoer to pay nothing and take the benefit of a policy of insurance for which it had paid no part of the premium—in other words—to reap where it had not sown. (Citing cases.)"

We will not discuss this matter in greater detail inasmuch as it is not actually within the scope of the reason assigned by the petition as a ground for issuing the writ of certiorari.[7]

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[7]Reason 1 of petitioner does not disclose a ruling of the Court of Appeals as to paragraph 6 of the lease and petitioner does not take exception to any ruling of the Court of Appeals on insurance matters, although both matters are referred to loosely *after petitioner begins its citation of cases* (Br. 7). We therefore deem these to be matters not properly before the Court and will not take up the Court's time with a complete brief as to them. This Honorable Court sits as a Court of Review with regard to certiorari matters and is entitled to the benefit of a ruling of the court

2. The judgment of the Court of Appeals is not in conflict with the case of *Anderson & Brown Co.* v. *Anderson*, 161 F. 2d 974 (C. C. A. 7th, 1947), but is in conformity with that decision.

In the Anderson case, *supra*, the court merely held that the plaintiff could not receive recovery *in a contract action*, under a contract which was unenforceable because of uncertainty or invalidity.

The case is not in point because the defendant in the instant case has never contended that the lease contract was unenforceable because of uncertainty or invalidity. The Anderson case, in our opinion, correctly states the law, but it is not in point, and therefore there is no conflict. Plaintiffs' case was submitted on tort, not on contract, and the entire contract was not pleaded in the petition nor disclosed on the face thereof. The reasons given and authorities cited under point one of this brief apply with equal force to petitioner's argument under its second point, which is repetitious of point one. In the Anderson case the defense was called to the trial court's attention, as was not done in the instant case.

Even if there were a conflict, the petitioner could not have been harmed thereby, because par. 7 of the lease does not give rise to a defense against plaintiffs' tort action as heretofore shown.

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below, which the *petition* must assign as being erroneous, *Duignan* v. *United States, et al.*, 274 U. S. 195, l. c. 200, 47 S. Ct. 566, l. c. 568, 71 L. Ed. 996. Petitioner should not be allowed to circumvent the rules of this Court and its decisions by supplying these deficiencies in a reply brief that respondents will be unable to show is not supported by the record or the law, so as to uphold the opinion of the Court of Appeals.

3. The opinion is not in conflict with the case of *General Mills, Inc.* v. *Goldman*, 184 F. 2d 359 (C. C. A. 8th, 1950), and even if it were, such conflict would not be a reason for granting certiorari, because the respective decisions were founded on the substantive law of different states and the decisions were both made by the Court of Appeals for the Eighth Circuit and therefore do not involve a conflict between circuits. The opinion also is not in conflict with Missouri decisions.

Petitioner really has grouped two reasons for granting certiorari under one heading; however, we will follow its outline.

Assuming, *arguendo,* that the *General Mills* case, *supra,* and the instant case are in conflict, this would be no reason for granting certiorari, because the respective decisions were based on the substantive law of different states.

The *General Mills* opinion, *supra* (Page 363), discloses that the case was governed by substantive law of Minnesota. The opinion of the Court of Appeals in the instant case discloses (R. 341) that it is governed by the substantive law of the State of Missouri.

In Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Vol. 8, Sec. 6301, p. 538, the rule is stated:

> "It would not do merely to show * * * a holding on a question of local law against the weight of authority. Local law in this connection refers to state law. * * * As to such cases, the Circuit Court of Appeals may be required to follow one state one day, and another the next day."

This Honorable Court has held that as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari. *Mullins* v. *N. Y. Life Ins. Co.,* 1938, 304 U. S. 202, l. c. 206-209, 58 S. Ct. 860, l. c. 861-863, 82 L. Ed. 1290, l. c. 1292-1294.

Further, if the *General Mills* case and the case at hand are in conflict, that would not involve conflict between Courts of Appeal of different circuits, as both cases were decided by the Court of Appeals for the Eighth Circuit. In Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Vol. 8, Sec. 6301, p. 538, it is stated:

> "The rule requires that the conflict be between two Circuit Courts of Appeals * * *."

Furthermore, factually, the *General Mills* case and the instant case are entirely different. In the *General Mills* case the decision was bottomed on a lease which provided that the tenant would return the premises at the end of the term in as good condition as when the lease commenced "* * * *loss by fire* and ordinary wear *excepted.*" (Italics ours.) The lease in this case contained no such exception in the case of fire, but *only* excepted "reasonable wear and tear thereof and damages by the elements." (Par. 3, Plffs.' Ex. 19, R. 39, offered R. 37). Damage by the elements cannot be construed to include damage by fire caused by defendant's negligence, but only damage caused by an Act of God. Therefore, the basis for the *General Mills* decision is absent in this case. It should be noted that in the General Mills case the pleadings were different than in the instant case, in that the defendant affirmatively pleaded that the terms of the lease absolved it from liability for damage by fire. The evidence also revealed entirely different facts. While there are other distinctions, it is submitted that the foregoing are sufficient to show the decisions are not conflicting.

Further, petitioner stated in its petition for rehearing before the Court of Appeals of the Eighth Circuit that its two opinions were in conflict (R. 355-361), and by

overruling the petition for rehearing (R. 379), the Court, in effect, held its opinions were not in conflict.

Petitioner's last assigned reason why certiorari should be granted apparently is that the Court of Appeals' opinion conflicts with Missouri decisions in holding petitioner liable for the negligence of Blosser. It is doubtful if this point is properly raised by the petition, but if so it is waived in petitioner's brief by its failure to cite Missouri authorities it considers applicable. In its brief it cites only one Missouri case, *which it states is not in point,* and then cites authorities as to the general weight of authority in other jurisdictions.[8] Even if the opinion did conflict with the general weight of authority in other jurisdictions, it would not be a ground for certiorari on a point controlled by state law. Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Vol. 8, Sec. 6302, pp. 547-548; Sec. 6254, p. 513.

Despite petitioner's waiver of the point, we would like to call the Court's attention to *Missouri decisions* which support the decision of the trial court and the opinion of the Court of Appeals.

In *Eberson* v. *Continental Investment Co.*, 118 Mo. App. 67, l. c. 73, 93 S. W. 297, l. c. 299 (1906), the Court held:

> "The principle is universally recognized that where a duty is incumbent upon one to do a particular work, he cannot escape liability for its negli-

[8]Petitioner's failure to cite Missouri decisions places respondents in an awkward position. They cannot file a reply to any reply brief that petitioner may file and therefore find themselves in a position where they will not be able to point out defects in any Missouri decisions petitioner may cite in its reply brief. Respondents could stand on the inapplicability of petitioner's citations in its original brief, and the resultant waiver. The petitioner might conceivably cite Missouri decsions in its reply brief, however, which the Court might accept in the absence of contrary authority cited by respondents. Respondents therefore pray the Court's indulgence while they lengthen their brief to include applicable Missouri decisions.

gent performance by committing its execution to an independent contractor."

For like authority holding that one cannot delegate a personal duty owed by contract to an independent contractor and escape liability therefor, see: *Morton* v. *William Barr Dry Goods Co.*, 120 Mo. App. 377, 103 S. W. 588, l. c. 592 (1907); *Phegley* v. *Graham*, 358 Mo. 551, 215 S. W. 499, l. c. 503; and *O'Hara* v. *Laclede Gas Co.*, 131 Mo. App. 428, 110 S. W. 642, l. c. 645 (1908). The above doctrine was extended still further in Missouri in *Bloecher* v. *Duerbeck*, 333 Mo. 359, 62 S. W. 2d 553 (1933).

Furthermore, regardless of its contractual duty, defendant was liable for the negligence of Blosser under Missouri law because of the *inherently dangerous work* required to be done. The air conditioning machinery on which Blosser was working had an unusual wiring arrangement which required special precautions to be taken (R. 143, 171-172) in order to prevent the escape of a highly explosive and inherently dangerous gas contained therein (R. 143, 163, 175, 279). The machinery was located within ten feet of an open flame (R. 288). The unusual wiring arrangement could not have been discovered without extensive search (R. 153) and was not known by Blosser to exist (R. 92, 93), although Schrader knew it existed (R. 287), but failed to warn Blosser (R. 112, 287).

The combination of these conditions made the repair work to be done by Blosser *inherently dangerous*, as admitted by defendant's own expert witness (R. 249).

The law is settled in Missouri that a contractee is liable for injuries caused by an independent contractor, employed by it to do *inherently dangerous work*. *Johnson* v. *J. I. Case Threshing Machine Co.*, 193 Mo. App. 198, 182 S. W. 1089 (1916), and *Galentine* v. *Borglum*, 235 Mo.

App. 1141, 150 S. W. 2d 1088 (1941). The Court of Appeals so held (R. 343).

This Honorable Court has refused to grant certiorari on similar grounds. In *In re Woods, et al.*, 143 U. S. 202, l. c. 206, 12 S. Ct. 417, l. c. 418, 36 L. Ed. 125, l. c. 126, based upon the substantive law of Minnesota, this Honorable Court held:

> "But we do not regard the inquiry as to * * * whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the circuit court of appeals in reference to them."

It is submitted that the same consideration applies to the questions raised by the petitioner, which are shown, upon close examination, to be matters as to which the law in both the Federal and Missouri courts has been settled against petitioner's contentions.

Conclusion.

It has been shown that the instant case was correctly decided and the petitioner was properly held liable to respondents for the negligence of its employee, Schrader, or of its contractee's employee, Blosser. That under the substantive law of Missouri, petitioner was liable for Blosser's negligence—even though his negligence was the sole negligence. This rule of law is equitable, because it does not allow a party who has contracted to do certain

repairs and on whose financial responsibility the other contracting party depended, to shift its liability, imposed by contract or the inherently dangerous repairs to be made, to an independent contractor who may or may not be financially responsible."

The petition is thus shown to be without merit, and manifestly was sued out merely to delay proceedings on the judgment of the lower court, and respondents, therefore, respectfully request the Court to allow them damages in the amount of ten per cent as provided by Rule 30(2) of this Court, which is made applicable to petitions for writs of certiorari by Rule 44 of this Court, in addition to interest upon the amount of the judgment rendered in the trial court and affirmed by the Court of Appeals.

There is another petition for a writ of certiorari before this Honorable Court in this instant case, which involves the question as to whether the Court of Appeals after affirming the judgment of plaintiffs, made a correct ruling in directing that the case be remanded for a new trial on the issue of whether defendant was entitled to judgment over against third party defendant, Midwest Refrigeration, Inc., for the amount of said judgment. This issue does not concern plaintiffs as they were

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"The only case cited by petitioner under its Point 3, ***Bailey*** **v.** ***Zlotnick***, 149 F. 2d 505 (C. C. A. D. C. 1945), provides:

> "The effect of the cases which strictly limit the landlord's liability enables him to avoid a large part of the risks involved in making repairs and improvements and to compel an injured tenant to seek out and sue a contractor with whom he has had no dealings and who may not be financially responsible."

The same consideration applies herein, except that, in the instant case, it is the *landlord* who is seeking recovery, and the *tenant* who was contractually bound to make the repairs.

entitled to judgment against defendant regardless of whether the fire was caused by negligence of defendant's own employee, Schrader, or third party defendant's employee, Blosser.

As between defendant and third party defendant, it may be important (1) as to whether Blosser was negligent, and (2) whether Schrader was contributorily negligent.

As to plaintiffs this is immaterial, because defendant admits Blosser was negligent (Br. 3).

As stated in *Beave* v. *St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52 (1908):

> "* * * the respondent is not responsible for errors committed by the court in giving or refusing instructions declaring the rights of the defendants among themselves. He took no part in that, and could not have prevented the action of the court in that regard. If error it was in giving said instruction, plaintiff, adopting the quotation as made in the brief of counsel for respondent, could but sit 'like patience on a monument, smiling at grief.'"

Therefore, even if this Court should grant certiorari on the issues between the *defendants,* it should refuse to grant *this* petition for certiorari and should allow respondents to collect their judgment against petitioner *now*—irrespective of whether petitioner can thereafter be reimbursed by third party defendant for the amount it is obligated to pay.

It is therefore respectfully submitted that this case was correctly decided and does not involve matters of such gravity and general importance as to merit review

by certiorari and that the petition for a writ of certiorari should be denied.

Dated February 14, 1951.

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JAN 15 1951
CHARLES ELMORE CROPLEY
CLERK

No. 496

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

MIDWEST REFRIGERATION, INC., a Corporation,
Petitioner,

vs.

J. F. BATEMAN, J. W. GALBRATH, E. J. DAVIS, JAMES H. MOORE, Statutory Trustees, etc., and STANDARD BRANDS, INC., a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

MIDWEST REFRIGERATION, INC., a Corporation,
Petitioner,

vs.

J. F. BATEMAN, J. W. GALBRATH, E. J. DAVIS, JAMES H. MOORE, Statutory Trustees, etc., and STANDARD BRANDS, INC., a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in cause No. 14,106, entitled Standard Brands, Inc. (a Corp.), Appellant, vs. J. F. Bateman etc. et al., and Midwest Refrigeration, Inc. (Third Party Defendant).

JURISDICTION.

The judgment of the Court of Appeals was entered November 13, 1950.

Jurisdiction to issue rests on Title 28, United States Code, Section 1254.

STATEMENT.

This case arises under a petition filed in the name of the Statutory Trustees of Batemore, Inc., a dissolved real estate holding company (R. 17)*, owners of a building in Kansas City, by two fire insurance companies (R. 37) suing (under subrogation), the tenant of the building for a fire loss which they paid to said real estate holding company, following a fire, arising from the explosion of methyl chloride gas which partially destroyed the building.

The methyl chloride gas escaped from an air-conditioning system operated by Standard Brands, Inc., while tenants of the building under lease from said real estate holding company. The suit was based upon their negligence, in permitting the air-conditioning system to become in ill repair, by reason of which the gas escaped. The allegations being that said Standard Brands, Inc., failed, under the terms of the lease, to return the building in as good condition as received, by failing to exercise a high degree of care in keeping, repairing, operating and maintaining said air-conditioning system containing a highly toxic, volatile and explosive gas known as methyl chloride, thereby permitting said methyl chloride gas to escape in dangerous quantities and to ignite and explode (R. 51).

The air-conditioning system was being repaired at the time of the explosion. The petitioner, Midwest Refrigeration, Inc., had sent a pipe fitter, skilled in working upon air-conditioning systems (R. 43), to the building, at the request of the tenant and this man, with the assistance of the tenant's maintenance man, had just completed a few repair procedures, when the compressor head blew off, liberating the methyl chloride gas into the basement where a hot water heater was in operation, and the explosion and fire followed.

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* Record page 17.

Standard Brands, Inc., filed in the cause below a Third Party Petition, alleging in substance that the present petitioner, Midwest Refrigeration, Inc., had been employed by them as independent contractor to repair the air-conditioning system in said building and while doing so did negligently cause and permit the compressor to burst and the methyl chloride to escape. That said Midwest Refrigeration was solely responsible for such escape and its negligence, the proximate cause of the loss, and therefore prayed that any judgment rendered against them be rendered against Midwest Refrigeration (your petitioner here) (R. 10). The answer of Midwest Refrigeration consisted of a denial that they were independent contractors, with a statement that said air-conditioning system was at all times under the sole supervision and control of Standard Brands, Inc., and that third party defendant had no knowledge that said system contained explosive gas and they were merely performing very minor repairs under the direction of defendant's servant and employee. That said explosion was due solely to the conduct of defendants in permitting said system to be in disrepair and to be filled with a dangerous, explosive and inflammable chemical (R. 12).

Plaintiff below did **not** amend its petition so as to accept and proceed against Midwest Refrigeration, Inc., as an additional defendant. Therefore Midwest Refrigeration, Inc., remained solely as an indemnitor of Standard Brands, Inc. (provided they could be common law indemnitor under the applicable local law).

Midwest Refrigeration, Inc., filed a Motion to Vacate and Dismiss the Third Party Complaint (R. 307). The District Court granted this Motion by directing a verdict for Third Party defendant at conclusion of all the evidence (R. 309).

The testimony of Blosser (pipefitter of Midwest Refrigeration, Inc.) showed that Schroeder (maintenance man and engineer for defendant, Standard Brands, Inc.) told him specifically what he was to do in repairing the system, and also what he was **not** to do in repairing it (i. e., not to take apart and inspect the solenoid valves after other valves close by on the same line were found to be clogged). Part of this testimony was denied. But Schroeder did not deny that he told Blosser **not** to remove, inspect and repair the solenoid valve. He also admitted working with Blosser in making some of the specific repairs. Likewise the testimony as between Blosser and Crawford (manager of Standard Brands, Inc.) as to what occurred when he (Crawford) introduced Blosser to Schroeder. According to Blosser, Crawford said to Schroeder: "This is the man from Midwest. You will show him what you want done" (R. 57). This Mr. Crawford denied, saying that: "I told Mr. Blosser that Schroeder would point out the machinery and would help if he needed it" (R. 299).

The trial resulted in a verdict against Standard Brands, Inc., for $39,875.00, from which it appealed to the Court of Appeals.

The Court of Appeals by its judgment affirmed the verdict and judgment against Standard Brands, Inc., but reversed the Court below in directing a verdict for Third Party Defendant, Midwest Refrigeration, Inc., holding that a question of fact arose which should have been submitted to the jury. The Court of Appeals said:

> "The evidence is in conflict upon the question of independent contractor" (Opinion p. 13) (R. 347).
>
> "The fundamental difficulty . . . is that it assumes a question of fact, that is, that Midwest was not an independent contractor . . ." (Opinion p. 17) (R. 351).

"We hold that order to be erroneous" (entering a verdict for Midwest).

"If the jury should find under proper instruction that Midwest was employed as an independent contractor, then it is liable to defendant" (R. 351).

"For the foregoing reasons the judgment for Midwest is reversed . . ." (R. 353).

It is important in consideration of the question to be presented, to understand that the case falls into the general category of the handling of inherently dangerous materials. This was recognized by the Court of Appeals in its opinion when it said:

"Any operation where methyl chloride is present was shown to be dangerous just as an operation involving gasoline or gun powder is dangerous unless precautions commensurate with their nature are observed" (Opinion p. 5) (R. p. 345).

"It (Standard Brands, Inc.) knew that a dangerous refrigerant was in use and its duty was to exercise care commensurate with the known danger" (Opinion p. 8) (R. p. 343).

It must also be recognized that the undisputed testimony shows that during the making of the repairs to the air-conditioning system, the defendant, Standard Brands, Inc., was then in possession of the building, was conducting a business therein, with a maintenance man (Schroeder) employed who was in charge of maintenance in the building under a manager (Crawford) who was directly in charge of all equipment. That Schroeder helped Third Party Defendant Midwest's pipefitter to make the repairs and did direct him not to take off and inspect the solenoid valves, even after foreign material was found clogging the valves close by (R. 63-64). This is undisputed. It is shown that this had an important and proxi-

mate relationship to the escape of the methyl chloride gas (R. 93, 98). The solenoid valve was afterwards found to be defective.

It must also be remembered that this refrigeration system was not wired in standard fashion. The solenoid valves were actuated by electrical connections which could not be disconnected by cutting the main switch which stopped the compressor. This was unknown to Midwest Refrigeration, Inc., and was not explained to its pipefitter (R. 93, 104, 286, 287). He assumed a standard hook-up, when he made the repairs. This unusual hook-up could not be detected by ordinary inspection (R. 104). It also played a proximate and direct part in causing the escape of the methyl chloride gas (R. 93). Midwest did not work on methyl chloride systems because of the danger (R. 104). Blosser did not know that methyl chloride was in use until part of the system had been taken apart, when he discovered it. He continued to complete the repair work however.

SPECIFICATION OF ERROR.

1. The Court of Appeals rendered an erroneous decision when it held, contrary to applicable local law, that Midwest Refrigeration, Inc. (Petitioner here), could be an independent contractor of defendant Standard Brands, Inc., under the law.

(a) As a necessary proposition it also follows that the Court rendered an erroneous decision when it held that the lower Court should have submitted the facts to the jury from which such a legal relationship might arise.

2. The Court rendered an erroneous decision when it held, contrary to applicable local law, that Midwest Refrigeration, Inc., was a common law indemnitor of the defendant Standard Brands, Inc.

(a) As a necessary proposition it follows that the Court rendered an erroneous decision when it held that a question of fact arose from which such a relationship could be found by the jury.

3. The Court rendered an erroneous decision when it held, contrary to applicable local law, that there could be contribution between joint tortfeasors even though there was no joint judgment.

REASONS FOR GRANTING THE WRIT.

1. There is a conflict between the opinion and decision of the United States Court of Appeals for the Eighth Circuit and the applicable local law in the following respects:

(a) Under the local applicable law there can be no relationship of independent contractor and contractee between petitioner and Standard Brands. This was found to be true by the Trial Court. But the Appellate Court remands the case upon a statement that

> "If the jury should find that Midwest was employed as an independent contractor, then it is liable to defendant" (R. p. 351).

The various decisions of the Supreme Court of Missouri cited by petitioner are to the effect that in the handling of dangerous substances the relationship cannot arise.

In Salmon v. Kansas City Dist. Co., 241 Mo. 1, 39 L. R. A. (N. S.) 328, the Court said:

> "The relationship of owner and independent contractor is thereby prevented."

In Manus v. Kansas City Dist. Co., 228 Mo. A. 905, 74 S. W. (2) 506, l. c. 509, the Court said:

> "The relationship of independent contractor cannot legally exist."

See also Mattan v. Hoover, 350 Mo. 506, 166 S. W. (2) 557.

(b) The relationship between them cannot be that of common law indemnitor and indemnitee, to permit Standard Brands to recover their loss from Midwest because

(even though Standard Brands may not themselves be negligent) the acts of Midwest in making the repairs even though negligent are imputed to Standard Brands in the handling of dangerous substances.

This was found to be true by the Trial Court but reversed by the Appellate Court when they said that

> "No instruction was given on the issue of responsibility of an agent to his principal for damages caused by the agent's negligence for which the principal was responsible."

The various decisions of the Missouri Courts are to the effect that in such cases the negligence of the agent is imputed to the owner, making the owner himself guilty of such acts.

In the case of Markowitz v. Metropolitan St. R. R. Co., 186 Mo. 350, 69 L. R. A. 389, the Court said:

> "The ultimate of that doctrine is that the party to whom the negligence is imputed actually participated in the act of negligence—and is then charged with it—"

In Haynie v. Jones, 233 Mo. S. 948, 127 S. W. (2) 105, the Court said in effect that:

> "Defendant in legal contemplation was actually driving the car, the driver being merely the instrument through which it was being done."

In Williamson v. Fisher, 50 Mo. 198, the Court said:

> "The defendant was bound to know the width of his lot; and if he (by failure to disclose it to his contractor) becomes a party to an encroachment upon—his neighbor, by which his house is destroyed; he is a

co-trespasser, and is liable as though he made the excavation."

In all cases of imputation the person to whom the acts are imputed becomes thereby guilty of contributory negligence as a matter of law in any attempt at recovery for his loss. The Supreme Court of Missouri in Hodge v. Feiner, 338 Mo. 268, 90 S. W. (2) 90, approved the McKerall v. St. L. S. F. R. R., 257 S. W. 166, which said:

"The negligence of the driver was imputed to the plaintiff making her contributorily negligent."

See also Dinger v. Burham, 228 S. W. (2) 696 and 285 Fed. 97, 67 L. Ed. 1212.

This is supported by the Restatement of the law of Agency:

"If the principal authorizes a tort either advertently or inadvertently he cannot recover for harm resulting to him for it—the agent is subject to no liability to his principal." Vol. 2, p. 914.

An owner has a duty to inform the contractor of conditions which might produce tort liability, as set out in Williamson v. Fisher, supra (50 Mo. 198). In a like case the Supreme Court of Alabama said that the owner had the duty to warn and

"if as a proximate result of the breach of this duty (a trespass occurred) under stated principles of the common law the owner is liable as joint tort feasor with the contractor." Belcher Lumber Co. v. Woodstock Land & Mineral Co. (1943), 245 Ala. 5, 15 S. W. (2) 625.

The well established exception to the rule that where the work to be done under the contract is inherently dan-

gerous, then the responsibility cannot be shifted or delegated to an agent.

The basis of the rule being that the owner must see to the guarding of the work himself. Mallory v. Wilson Ice S. Co., 6 S. W. (2) 625; Carson v. Blogett Const. Co., 189 Mo. App. 120, 174 S. W. 447; Neal v. 12th & Grand Ave. Bridge Co., 70 S. W. (2) 136, 228 Mo. App. 536.

(d) Finally the rule has been laid down by the Supreme Court of the United States in Union Stock Yards v. Chicago, etc. R. Co., 196 U. S. 217, 49 L. Ed. 453.

> "There can be no indemnity in favor of a joint tort feasor, sued for or compelled to pay damages, as against one whose fault is of equal grade and similar in character.
>
> "Where two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages cannot have indemnity or contribution from the other, because both are equally culpable—and the damage results from their combined acts.
>
> "In the present case the negligence of both parties has been of the same character—both contributed to same injury."

This was held to be a matter of law—not of fact—since the matter came up to the Supreme Court upon the granting of a demurrer to a petition below.

CONCLUSION.

Certiorari should be granted to review the judgment of the Court of Appeals, since this third party defendant should not be compelled to undertake another trial before a jury in the lower court upon an erroneous interpretation of the local law by the Court of Appeals, after the lower

court correctly applied the local law originally in directing a verdict in favor of your applicant.

Respectfully submitted,

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No. 496

In the

Supreme Court of the United States

October Term, 1950.

MIDWEST REFRIGERATION, INC., a Corporation, *Petitioner*,

vs.

J. F. BATEMAN, J. R. GALBRATH, E. J. DAVIS, JAMES H. MOORE, Statutory Trustees, etc., and STANDARD BRANDS, INC., a Corporation, *Respondents*.

REPLY BRIEF OF STANDARD BRANDS, INC., TO PETITION FOR A WRIT OF CERTIORARI, to the United States Court of Appeals for the Eighth Circuit.

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In the

Supreme Court of the United States

October Term, 1950.

No. 490.

MIDWEST REFRIGERATION, INC., a Corporation, *Petitioner*,

vs.

J. F. BATEMAN, J. R. GALBRATH, E. J. DAVIS, JAMES H. MOORE, Statutory Trustees, etc., and STANDARD BRANDS, INC., a Corporation, *Respondents*.

REPLY BRIEF OF STANDARD BRANDS, INC., TO PETITION FOR A WRIT OF CERTIORARI,

to the

United States Court of Appeals for the Eighth Circuit.

ADDITIONAL STATEMENT OF FACTS.

Two fire insurance companies filed this action in the name of the statutory trustees of Batemore, Inc., a dissolved corporation (R. 17). Batemore, Inc., prior to its dissolution, was the owner of a building in Kansas City, Missouri, being leased in 1916 to Standard Brands, Inc. (R. 37). The building, insured against fire loss (R. 304) by the two fire insurance companies (R. 158, 159) was

damaged by a fire on June 26, 1946 (R. 296). A repairman from Midwest Refrigeration, Inc., was replacing the bellows on the pressure switch used in the air-conditioning unit. He permitted the refrigerant to flood and break the head of the compressor of the unit. The refrigerant escaped and became ignited (R. 276).

The two fire insurance companies paid to Batemore, Inc., the sum of $39,875. They brought suit against Standard Brands to recover the $39,875 (R. 317). Standard Brands then filed a third party complaint against Midwest Refrigeration, whose employee, Blosser, the repairman, was replacing the bellows on the pressure switch on the air-conditioning unit in the building at the time the refrigerant escaped (R. 275, 276, 298).

At the close of all of the testimony the district court directed the jury to return a verdict in favor of Midwest Refrigeration (R. 320). The court overruled the motion of Standard Brands for a directed verdict (R. 327). The court then submitted the case to the jury under an instruction which told the jury that Standard Brands was liable for the negligence of Blosser, the employee of Midwest Refrigeration (R. 318).

The jury returned a verdict in favor of the plaintiffs in the sum of $39,875 (R. 322). Judgment was entered in favor of the plaintiffs and against Standard Brands (R. 324). Judgment was also entered in favor of Midwest Refrigeration and against Standard Brands (R. 324).

The Circuit Court of Appeals affirmed the judgment in favor of the plaintiffs and against Standard Brands on the ground that paragraphs 2 and 3 of the lease required the tenant to repair, and that the tenant was liable for fire loss caused by the negligence of an independent contractor while making those repairs. The lease was set out in toto in plaintiffs' petition and introduced into evidence by plaintiffs. The court held that paragraph 7 of

the lease which required the landlord to repair fire damage could not be considered (R. 353, 354, 345).

The Circuit Court of Appeals reversed the judgment in favor of Midwest Refrigeration and ordered a new trial on the issues in that case (R. 353). The opinion ruled that the agent was responsible to his principal for damages caused by the agent's negligence for which the principal was liable (R. 346). The court held that there was a conflict in the evidence of the independent contractor relationship and for that reason ordered a new trial.

Standard Brands has filed its petition for certiorari to this Court to review the judgment of the Circuit Court of Appeals in favor of the statutory trustees and against Standard Brands. Midwest Refrigeration has now filed its petition for certiorari to this Court to review the judgment which orders a new trial of the Standard Brands-Midwest action.

If Standard Brands is successful before this Court, then Midwest Refrigeration will also be successful. Its liability is based solely on the third party complaint of Standard Brands. The plaintiffs did not join Midwest Refrigeration as a defendant in their action.

Standard Brands by the testimony of its witnesses proved that the fire was caused by Blosser's negligence. On June 26, 1946, Standard Brands was employing a maintenance man by the name of Joe Schrader, whose duties were to start and stop the machinery and report any malfunctioning of the equipment (R. 297). He had been specifically instructed not to repair any air-conditioning equipment but to report any malfunctioning to his superiors (R. 297, 272).

About one or two weeks before June 26, 1946, Schrader had reported to the staff assistant of the operating manager of Standard Brands, Mr. Max Crawford, that the

air-conditioning was not properly cooling one of the offices (R. 298).

Mr. Crawford called Midwest Refrigeration, who were experts in the repair and maintenance of refrigeration and air-conditioning units, and the best in Kansas City. Mr. Crawford advised them that the air-conditioning unit was not functioning properly and asked them to come over and make the necessary repairs (R. 298, 85).

Mr. Blosser, an employee of Midwest Refrigeration, came over to the Standard Brands office and reported, on June 26, 1946, that he had been sent to repair the air-conditioning equipment (R. 298). Blosser was asked to repair the equipment and he was told that Schrader, the maintenance man, would show him where the machinery and equipment was located (R. 299).

Blosser used a torch leak detector and found a bad leak at the bellows of the pressure switch. Schrader, the maintenance man, had nothing whatever to do with the repair of this leak at the pressure switch (R. 94, 275). Blosser did not take proper precautions while making the repairs and allowed the liquid methyl chloride to escape into the compressor. He then turned on the pressure switch which caused the head of the compressor to break, thereby allowing the methyl chloride to escape. A fire was present in the boiler and the fire occurred.

The Writ Should Be Limited to Review the Judgment for the Plaintiffs and Against Standard Brands.

There is no conflict between the decision of the United States Court of Appeals for the Eighth Circuit and the applicable local law in the judgment awarding a new trial on the Standard Brands-Midwest part of the suit.

(1) Under the local applicable law the relationship of Midwest and Standard Brands was that of independent contractor rather than master and servant.

The Supreme Court of Missouri has many times adopted the tests used by the Restatement of the Law of Agency in determining whether any relationship is that of master and servant or that of an independent contractor. See *Mattan* v. *Hoover,* 350 Mo. 506, 166 S. W. 2d 557 (1942); *Skidmore* v. *Haggard,* 341 Mo. 837, 110 S. W. 2d 726 (1937); and *Bass* v. *Kansas City Journal-Post Co.,* 347 Mo. 681, 148 S. W. 2d 548 (1941).

The tests applied by the Supreme Court of Missouri as set out in Section 220, Restatement of the Law of Agency, are as follows:

> "(a) The extent of control which by the agreement, the master may exercise over the details of the work."

Standard Brands had no agreement whereby it could exercise control over the details of repairing the air-conditioning system. The evidence is undisputed that it did not exercise any control over the details of the work. The manner of repairing the pressure switch was left entirely to Midwest's employee, Blosser.

> "(b) Whether or not the one employed is engaged in a distinct occupation or business."

Midwest was an air-conditioning service company. Standard Brands was engaged in the sale of foods.

> "(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision."

The servicing and repair of air-conditioning units is universally done by specialists such as Midwest. The

replacement of a pressure switch on an air-conditioning unit is particularly a job for a specialist.

> "(d) The skill required in the particular occupation."

Replacing a pressure switch requires skilled and trained personnel.

> "(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work."

The instrumentalities and tools were furnished by Midwest. The place of work was necessarily located at the Standard Brands office.

> "(f) The length of time for which the person is employed."

Midwest was employed only for the particular job of repairing malfunction in the operation of this air-conditioning unit. There was no fixed amount of time for the repair.

> "(g) The method of payment, whether by the time or job."

The record is silent as to the method of payment.

> "(h) Whether or not the work is a part of the regular business of the employer."

Standard Brands is in the business of selling foods, not repairing air-conditioning units.

> "(i) Whether or not the parties believe they are creating any master and servant relationship."

No one believed that Midwest in repairing the air-conditioning unit became the servant of Standard Brands.

It is apparent that all the factors point to an independent contractor relationship. It would be difficult to find a set of facts which more completely fulfill the tests of the independent contractor as set out above by the Restatement of Law of Agency and adopted by the Supreme Court of Missouri.

(2) Blosser's negligence caused the fire.

The Court of Appeals summarized the testimony in the trial court that the fire was caused by Blosser, stating as follows (R. 340):

> "Expert witnesses were produced by both parties from whose testimony it may fairly be said that the explosion could have been avoided (1) had the refrigerant been 'pumped down' into the receiver before making the repair on the pressure switch, (2) or had the valve on the compressor been closed, (3) or had the pressure switch been blocked, (4) or had the solenoid valve been closed. The solenoid valve was the valve through which the gas passed on its return from the rooms on the upper floors to the basement. *It is conceded that failure to take one or more of these essential precautions was negligence resulting in the fire.*" (Italics ours.)

It is equally difficult to find a set of facts which more completely show that Midwest, the independent contractor, was negligent in performing its work.

(3) Under the local applicable law an agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom.

Since Midwest, by its servant, Blosser, is the agent of Standard Brands and was negligent and its negligence caused the explosion, then it is liable to Standard Brands

for the total damage which its negligence caused Standard Brands to suffer.

In *State ex rel. Algiere* v. *Russell,* ..... Mo. ....., 223 S. W. 2d 481 (1949), the court quoted with approval the following from Section 401 of the Restatement of the Law of Agency (l. c. 483):

> " 'Unless he has been authorized to act in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom. This includes the payment of damages by the principal to the third person, or of a fine to the State in case of a crime. Thus, a servant who, while acting within the scope of his employment, negligently injures a third person, although personally liable to such person, is also subject to liability to the principal if the principal is thereby required to pay damages. * * *' "

If Standard Brands is liable to the plaintiffs and is required to pay for the damage caused by the fire, then Midwest is in turn liable to Standard Brands for such payment. Midwest was guilty of the negligence which caused the fire.

The rule as advanced by Midwest that "the well-established exception to the rule that where the work to be done under the contract is inherently dangerous, then the responsibility cannot be shifted or delegated to an agent" is correct as far as it goes. That is to say, if a third person is injured by the negligence of an agent doing work that is inherently dangerous, then the principal will be liable to such third person. The rule does not, however, relieve the agent from liability to the principal for the amount of damages the principal is required to pay such third person. If this third person elects to sue only the

principal, then the principal cannot use as a defense the negligence of the agent or independent contractor. But this does not prevent the principal from then recovering back from the agent the loss he has suffered because of such agent's negligence. "The agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom." *State ex rel. Algiere* v. *Russell* (*supra*).

In *Busch and Latta Paint Co.* v. *Woermann Const. Co.*, 310 Mo. 419, 276 S. W. 614 (1925), the plaintiff had hired the defendant to build a scaffold for the plaintiff's employees. It was constructed negligently although defendant was engaged in the business of erecting scaffolds and had engineers skilled in that particular work. The scaffold fell and plaintiff was required to pay compensation to his employees on the theory that he had negligently failed to inspect the scaffold and be sure it was safe. Plaintiff then sued to recover these payments from the defendant. The defense was that the plaintiff and defendant were joint tort-feasors and therefore one cannot be made to indemnify the other. The Supreme Court held that "In all cases where one party creates the condition which causes the injury, and the other does not join therein, but is exposed to liability, and suffers damages on account of it, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity does not apply" and the plaintiff was allowed to recover.

The same result was reached in *City of Springfield* v. *Clement*, 225 S. W. 120 (Sp. Ct. of App. 1920) where the City of Springfield was compelled to pay damages for injury to a person, caused by a defective sidewalk, and the city was allowed to recover against the owner of the property who permitted the sidewalk to became defective.

Midwest with its scientific and expert knowledge undertook to repair this air-conditioning system. Standard Brands was ignorant of what was necessary but in good faith thought Midwest was competent to perform the repairs and trusted them to do so in a safe way because they were experts in this field. The negligence that caused the fire was due solely to the negligence of Midwest's employee. This does not put the parties *in pari delicto.* So far as their relations to each other are concerned, it leaves them where they were before with Standard Brands being entitled to be indemnified for any loss which it might suffer because of the negligence of Midwest.

Conclusion.

Certiorari should be granted to review the judgment of the Court of Appeals holding that Standard Brands is liable to the plaintiffs. If Standard Brands is successful, then Midwest is not liable. Certiorari should not be granted to review the judgment of the Court of Appeals in the Standard Brands-Midwest action.

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